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Supreme Court of the United States

OCTOBER TERM, 1967

No. 722

CAPTAIN DALE E. NOYD, FR 28084,
Petitioner,

v.

HONORABLE ROBERT S. McNAMARA,
Secretary of Defense, *et al.*

BRIEF OF *AMICUS CURIAE* AMERICAN HUMANIST ASSOCIATION IN SUPPORT OF A PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF OF *AMICUS CURIAE* AMERICAN HUMANIST ASSOCIATION IN SUPPORT OF A PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on May 16, 1967, and *Amicus Curiae* supports this petition.

Interest of *Amicus*

The American Humanist Association is an organization of individuals who believe that for man to realize his potential he must apply reason and the principles of science to the solution of his personal and social problems. Humanists believe that mankind has only itself to rely upon and only this life with which to be concerned. Therefore, humanists would agree with the philosopher, Albert Camus, that:

> If there is a sin against life, it consists perhaps, not so much in despairing of life as in hoping for another life and in eluding the implacable grandeur of this life (The Myth of Sisyphus).

This interest in improving our present life has led humanists to be concerned about world peace. Many humanists, though by no means all, have reached the conclusion that any war and the participation in any armed conflict is morally unjustifiable. Others have concluded that only wars of aggression must be opposed. The American Humanist Association believes that both are equally entitled to exemption and therefore requests permission to file this brief as *Amicus Curiae* in support of the petition for certiorari of one who opposes only certain wars.

Consent of the Parties

Permission to file this brief has been granted by both the Solicitor General of the United States and by counsel for the petitioner, and the consents have been filed with the Clerk of the Court by letter dated October 12, 1967.

Opinions Below

The March 29, 1967 opinion of the United States District Court for the District of Colorado, Hon. William E. Doyle, U. S. D. J., granting, in part, petitioner's motion for a preliminary injunction is printed in the Appendix to the petition.* The April 25, 1967 opinion of the District Court, per Judge Doyle, after trial, dismissing the complaint on jurisdictional grounds, is reported at 267 F. Supp. 701. The *Per Curiam* opinion of the Court of Appeals for the Tenth Circuit, affirming the District Court, is reported at 378 F. 2d 538 (1967).

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* References to material printed in the Appendix to the Petition will hereinafter appear as "App. —"

Jurisdiction

The judgment of the Court of Appeals was entered on May 16, 1967. On August 10, 1967, Mr. Justice Fortas issued an order extending the time in which to file this petition for a writ of certiorari up to and including September 13, 1967, and on September 13, 1967, Mr. Justice Fortas further extended such time up to and including October 13, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statement of Questions Presented

1. Does denying petitioner conscientious objector status because of his selective opposition to war interfere with the free exercise of his religion? Does such a denial wrongly discriminate against his religious beliefs?

2. Do the pertinent Air Force Regulation, AFR 35-24, and its statutory basis, § 6(j) of the Universal Military Training and Service Act, 50 U. S. C. § 456(j), authorize the grant of conscientious objector status to one whose particular religious beliefs lead him to oppose only certain wars?

3. Where petitioner has fully satisfied all pertinent administrative procedures for raising the issue, is he also required to provoke a court martial and a potential criminal penalty before the civilian court will consider the legal issue involved?

4. Is *habeas corpus* an appropriate procedure for raising this issue of law?

Constitutional and Statutory Provisions and Air Force Regulations Involved

This case involves the due process clause of the Fifth Amendment and the religious liberty and establishment of religion clauses of the First Amendment.

The statute most closely involved is that which expresses national policy on conscientious objection to participation in military service, Section 6(j) of the Universal Military Training and Service Act of 1950, as amended, 50 App. U. S. C. § 456(j).

Many provisions of Air Force Regulations are involved. The principal regulation is AFR 35-24, entitled "disposition of Conscientious Objectors" and is set forth in full in the Appendix to the petition, App. 23a.

Statement of the Case

Petitioner is an Air Force Captain who became "a conscientious objector to wars of aggression, particularly to the Vietnam conflict," 378 F. 2d at 538, after 11 years of honorable service, while he was assigned as Assistant Professor of Psychology at the Air Force Academy. Petitioner's conscientious beliefs were set forth in detail in the complaint, and Exhibits A to K attached thereto (R. 29-76),* all of which were received in evidence and were the subject of considerable testimony in the proceedings below. They were perhaps best summarized by District Judge Doyle in his opinion of March 29, 1967, as follows:

> "* * * he holds a philosophy which he declares as 'ethical humanism' which dictates these scruples against war * * * he does not object to all war * * * he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending

* References to the transcript of the record will appear as "R. ——".

> the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States" (App. 1a).

Petitioner made application under appropriate regulations for resignation from the Air Force, both in the best interests of the Air Force under Air Force Regulation (hereinafter "AFR") 36-12, and on specific grounds of conscientious objection under AFR 35-24 (App. 23a). Both applications, as well as the text of AFR 35-24, were attached as Exhibits A, B and C to the complaint. The applications specified that petitioner sought either acceptance of his resignation, or reassignment to duties not in conflict with his conscientious position. Both applications were denied and petitioner, a former fighter pilot, received orders assigning him to the 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico, for upgrade training in F-100 jet fighter aircraft. "This aircraft is currently being used in Vietnam, and the probability is strong that anyone receiving training at Cannon can anticipate transfer to the combat zone" (267 F. Supp. at 705).

Prior to the effective date of such transfer order, April 1, 1967, petitioner and his counsel made various attempts to confer with superior military and civilian Air Force officials for the purpose of obtaining a reassignment which would not be in conflict with his conscience and which would thereby preclude this litigation. All of these futile efforts were set forth in detail in the complaint.

On March 27, 1967 this action was instituted in the United States District Court for the District of Colorado, seeking declaratory judgment, injunctive relief, relief in the nature of *habeas corpus,* and ancillary relief. Capt. Noyd argued, *inter alia,* that his application for recognition as a conscientious objector, and either separation or appro-

priate reassignment, were improperly and discriminatorily denied by the Air Force, in violation of his constitutional rights and relevant statutes and regulations.

On March 27th, simultaneously with the filing of the complaint, a motion was made seeking preliminary injunctive relief; specifically, that respondents should be restrained from executing their anticipated order of assigning petitioner to fly fighter aircraft in Vietnam, or to train therefor, or to other duty in conflict with his conscience, prior to the determination of this action by the Court.

After a hearing, the Court concluded that it did not have jurisdiction of the cause, essentially for lack of exhaustion of military remedies, and denied the petition. Notice of appeal was timely filed in the Court of Appeals for the Tenth Circuit, and a stay was granted pending appeal, pursuant to the All Writs Statute, 28 U. S. C. § 1651(a), over the respondents' objections. Submission of briefs and oral argument were accelerated, and on May 16, 1967 the Court of Appeals affirmed the District Court, 378 F. 2d 538 (App. 19a), but continued the stay for a period of ten days to allow time for a stay application pending certiorari to be made to this Court. An application for a stay of the mandate of the Tenth Circuit was timely presented to Mr. Justice White, as Circuit Justice for the Tenth Circuit, and denied on June 2, 1967.

Subsequently, petitioner was transferred to Cannon Air Force Base. In a further attempt to exhaust every conceivable Air Force administrative remedy, he submitted, on June 19, 1967 a new application for resignation or reassignment as a conscientious objector, and attached thereto, as further evidence of his religious beliefs, and the sincerity with which he held them, the transcript of the testi-

mony heard in the District Court. This petition was denied on August 21, 1967, and petitioner was ordered to F-100 recurrency training and upgrade training as an instructor pilot. This training is now continuing.

Reasons for Granting the Writ

I. The denial of petitioner's application for conscientious objector status because of his selective opposition to war interferes with the free exercise of his religion, wrongly discriminates against him, and is contrary to a reasonable interpretation of the statute: because of the recurring and widespread incidence of this problem, this Court should grant certiorari.

A. Petitioner's application for conscientious objector status under AFR 35-24 was denied solely because he is not opposed to participation in all wars, for neither the religious basis for his belief nor his sincerity are disputed, and no other reason for rejection appears.

1. Petitioner's beliefs are religious in character.

As the March 29, 1967 opinion of the District Court makes clear, see Appendix to Petition 1a. Petitioner is a humanist, who is unwilling to participate in what he considers wars of aggression, though he has no objection to fighting in defense of the United States (Record 576). The basis of his belief is clearly religious under the standards of *United States v. Seeger*, 380 U. S. 163 (1965). Thus, in his application for conscientious objector status Petitioner described his belief as follows:

> If the definition of "Supreme Being" is limited to include only the traditional Christian concept of a personalistic, anthropomorphic, and omnipotent supernatural-creator-object-being whom I worship and upon whom I depend for salvation or a meaning for my life, then I do not believe in such an object-being • • •

> If, however, the definition is to include the "God beyond God" of the "ground of Being" of Paul Tillich; the "existential Being" of Martin Buber; or "* * * the perfect pattern, envisioned by faith, of humanity as it should be * * *" of David Muzzey; then I believe in a Supreme Being. The "god" in which I believe transcends the traditional Christian God and yet does not transcend human experience and faith built upon that experience; it is an ultimate concern for man, his purpose, and his possibilities. Part of the essence of that in which I believe is captured by Tillich: "'God' is the answer to the question implied in man's finitude; he is the name for that which concerns man ultimately. This does not mean that first there is a being called God and then the demand that man should be ultimately concerned about him. It means that whatever concerns a man ultimately becomes god for him * * *"

Directly quoting Dr. David S. Muzzey's statement, as quoted in *Seeger,* Petitioner added:

> Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that it expresses itself in the human world as the power which inspires in men moral purpose * * *

And all the expert witnesses agreed that Petitioner's views were religious (R. 482, 496, 511, 527), even though some disagreed with his position on the Vietnam conflict (R. 484, 499). Thus, Dr. Robert C. Kimball, the literary executor for Paul Tillich, declared that "definitely, in this sense of Tillich's that religion is ultimate concern— Captain Noyd comes off as a very religious person" (R. 511).

The fact that Petitioner's beliefs are partly derived from and touch upon grounds which orthodox religious people might consider secular, *e. g.*, the thinking of Erich Fromm, Camus, Dewey and others, does not militate against their essentially religious nature, as was clearly recognized in *Fleming v. United States*, 344 F. 2d 912, 915-16 (10th Cir. 1965), relying on *Seeger*, 380 U. S. at 186. As our religious organizations became more involved in social problems, a rigid separation between religious and social thought becomes ever more unrealisitic. The fact that Petitioner's belief involves selective opposition to war is equally irrelevant to its religious character, for numerous religious groups have taken and are now taking a similar selective position (R. 500-02, 517-19, 534-46). Indeed, the total pacifists are a very small minority among religious groups (R. 546).

2. PETITIONER'S SINCERITY IS UNDISPUTED.

Petitioner's sincerity is equally clear, and is not really questioned in this case. See Decision of Court of Appeals, 1st para. There is also a vast amount of evidence in the record of this proceeding attesting to his sincerity. For example, Petitioner's base Chaplain, Captain Donald B. Clapp, who met with the petitioner two or three times a week for some months described him as "totally and thoroughly sincere * * *" "display[ing] to me as much, if not more, personal integrity than any human being that I have ever met." (R. 418, 478), though Captain Clapp himself did not agree with Petitioner's views on Vietnam. The Chaplain reported also that the Senior Protestant base chaplain had written that "this officer is completely honest and sincere in taking the action he has taken. He is deeply concerned with his own integrity and that of our nation." There is nothing in the record to cast any doubt on this

unanimously held judgment, and under *Dickinson v. United States*, 346 U. S. 389 (1954), there would be no basis for a contrary finding. See also *Fleming v. United States*, 344 F. 2d 912, 915 (10th Cir. 1965); *Rempel v. United States*, 220 F. 2d 949 (10th Cir. 1955); *Jessen v. United States*, 212 F. 2d 897 (10th Cir. 1954).

Thus, there can be and was only one basis for denying conscientious objector status to Petitioner and that was his opposition to any war except in defense of his country. Indeed, the Government admitted as much, for in its Memorandum to the District Court that was the only point it argued to support its contentions that the complaint stated no cause of action and that there was no genuine issue of material fact.

B. This Court should review and reverse the denial of conscientious objector status because this denial (1) unjustifiably interferes with the free exercise of his religion; and (2) wrongly discriminates against him because of his particular content of his religious convictions.

1. THE REFUSAL UNJUSTIFIABLY INTERFERES WITH PETITIONER'S FREE EXERCISE OF HIS RELIGION BY PREVENTING HIM FROM ACTING IN ACCORDANCE WITH HIS RELIGIOUSLY-BASED CONSCIENTIOUS OBJECTION TO PARTICIPATION IN THIS WAR.

a. *The religious conscience and selective opposition.*

A religiously based conscientious objection to a war is no less either religious or conscientious because it permits fighting in defense of one's country, and objects solely to what the conscience considers an aggressive and hence immoral war. Certainly, almost all religions permit their members to fight in some wars but not in others. The

Catholic doctrine of the just war is well known, and is deeply rooted in St. Augustine and St. Thomas Aquinas; various Protestant groups have recently come out for the right of selective opposition to unjust wars, see, *e.g.*, A Policy Statement of the National Council of Churches of Christ in the United States of America (Feb. 23, 1967); Moslems believe in holy wars; Jehovah's Witnesses believe in theocratic wars and in self-defense of their brethern and their Church, *Sicurella v. United States,* 348 U. S. 485 (1954); *Kretchet v. United States,* 284 F. 2d 561 (9th Cir. 1960). Even Quaker doctrine seems to approve of the use of force to maintain world peace, as can be seen from William Penn's charter for world government. See Sibley & Jacob, Conscription of Conscience: 1940-47 25 (1952). Indeed, as the expert testimony at the hearing brought out, almost every pacifist believes in the use of force for police purposes at least. As we stumblingly grope for some kind of world government, such force will be necessary for international police work. Thus, as Stanford's Dr. Robert McAfee Brown testified: "Those who have taken the more traditional pacifist position have represented a small minority numerically within Christian history." (Rec. 546).

Nor does the fact that Petitioner opposes only wars of aggression and is willing to fight in defensive wars make his choice any less a matter of conscience. As Chief Justice Hughes said in a similar position in *United States v. MacIntosh,* 283 U. S. 605, 627 (1931) (dissent):

> There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for renunciation of war presuppose a preponderant public sentiment against wars of aggression." 283 U. S. at 635.

b. *Permitting selective opposition will not impugn the integrity of the governmental process.*

It has been argued that a community cannot allow its citizens to pick and choose among wars for this would allow the citizen to make the same type of political decision as his government, but outside the context of the political process. See Note, *The Conscientious Objector and the First Amendment*, 34 U. Chi. L. Rev. 79, 102 (1966). But such impugning of the established democratic process could exist only where the citizen's dissenting position is based on the same considerations at the state's. This may exist where the dissent is based solely on political grounds. The religious dissenter however, grounds his objection on factors which a secular state cannot even consider—his religious beliefs. There is thus no derogation of the political process in honoring a religiously based objection, which is really outside the secular political decision-making process.

This is not to say that there is a rigid separation between the political and the religious, an assumption which also underlies the above-stated objection to selective opposition. Such a separation has never existed and probably never will or should, for so long as religion is relevant to how men live in this world, it must be concerned with social and political problems. But this in no way detracts from the religious, non-secular source of the objection.

The complex and subtle relationship between religion and politics was clearly noted by this Court in *Seeger*. There, it recognized not only the inevitable link between religion and politics, but also the difference between a politically grounded objection and one that is religiously based. In discussing the statutory language describing those whose beliefs do not qualify them for conscientious

objector status, the Court stressed the purely secular nature of those beliefs. Thus, this Court noted that there were two classes of ineligibles: (1) "Those persons who, *disavowing religious belief*, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it," 380 U. S. at 173 (emphasis added), and (2) those whose objections are based on a "merely personal moral code." With respect to this latter, the Court explained that this referred to a moral code which is in no way religious *id.* at 186. Thus the exclusions apply to objections based *solely* on "political, sociological or economic considerations," or on a "moral code" which contains no religious ingredient whatsoever. On the other hand, one whose "political sociological, economic" or "moral code" objection does derive from his religious belief, is entitled to exemption, as was expressly recognized in *United States v. Fleming*, 344 F. 2d at 916.

As Chief Justice Hughes stated in *MacIntosh:*

> "There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power." 283 U. S. at 634.

This is not to say, of course, that conscience should be ignored when based on non-religious morality. It is only to say that such a situation does not raise problems posed by a religiously-oriented selective opposition, as in this case.

c. *Permitting selective opposition will not interfere with necessary governmental functions.*

It has been noted many times that the number of conscientious objectors is so small that allowing the claim will not interfere with the military objectives of the nation. See, *e.g.*, Note, 34 U. Chi. L. Rev. at 103-04. Though this was said with respect to total pacifists, permitting selective objectors would not appreciably swell the number, especially if, as the law presently stands, it is limited to those who are sincerely religious. This is in part because local boards and other tribunals are not easily persuaded of the applicant's sincerity, *cf. e.g., Dickinson, supra,* and it takes a good deal of courage to be a conscientious objector. See Sibley & Jacob 461. The *Schwimmer* theory that a pacifist's example will deter many from serving in the military by his example, has been thoroughly discredited, for in times of crisis, very few indeed are influenced by the pacifist. See *United States v. Schwimmer*, 279 U. S. 644, 659 (1929).

There are also certain practical considerations in this regard. No conscientious objector, whether selective or total, is likely to make a good soldier. Many are willing to accept alternate service, as Petitioner was and is (Complaint ¶¶ 22-23), and it seems a flagrant waste of highly trained and scarce resources to force such a person to go to jail in order not to violate his conscience. *Cf. United States v. MacIntosh*, 283 U. S. at 629. It seems especially wasteful since it is clear that in this area compulsion simply does not work—it merely puts a substantial number of people behind bars and fails either to deter or to make use of the true conscientious objector. Sibley & Jacob 475-78.

d. *The importance of respecting conscience.*

Regardless of whether there is a constitutional right to a conscientious objector exemption, there can be no doubt that the order to report for flight training for eventual participation in the Vietnam war conflicts with the dictates of Petitioner's conscience. Yet, "both morals and sound policy require that the state should not violate the conscience of the individual * * *" Stone, *The Conscientious Objector*, 21 Colum. U. Q. 253, 269 (1919) as quoted in *United States v. Seeger*, 380 U. S. at 170. In *United States v. MacIntosh*, 283 U. S. at 633 Chief Justice Hughes, joined by Justice Holmes, Brandeis and Stone wrote, "In the forum of conscience, duty to a moral power higher than the State has always been maintained."

We live today, in a world where man's destructive skills have far outdistanced his meager peace-making wisdom, where harsh voices of frustration, cruelty, and arrogant power often render the still small voice of conscience virtually mute. In such a world, we should not readily override a sincerely religious "respect and love for man, faith in his inherent goodness and perfectability," see Noyd Affidavit attached to Complaint, an attachment to an "ideal * * * [of] a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to enlist the best in their fellow men," Muzzey, cited in 380 U. S. at 183. As the American poet Karl Shapiro has reminded us in his poem "The Conscientious Objector,"

"..... Your conscience
Is what we come back to in the armistice."

And where men, frightened and without faith, bewildered and frustrated, run from one false god to another and lose their small measure of tolerance, they come to resent those

who try to stand apart in the name of conscience. Just as the prophets and Jesus were reviled and persecuted in their troubled times, so is today's conscientious objector. See generally Sibley & Jacob, *supra*. At such times, it becomes all the more important that moral conscience be protected, for it is at such times that it is most endangered and yet most needed.

2. THE REFUSAL TO HONOR THE CONSCIENTIOUS OBJECTIONS OF PETITIONER'S RELIGIOUSLY BASED SELECTIVE PACIFISM DISCRIMINATES AGAINST PETITIONER'S RELIGIOUS BELIEFS.

An exemption granted to one religious belief on religious grounds cannot be denied to another. See *Sherbert v. Verner*, 374 U. S. 398, 404 (1963); *Torcaso v. Watkins*, 367 U. S. 488, 495 (1961). If one man's religious belief precludes him from participating in a war because of the nature of that *particular* war, and another's belief precludes him from such participation in that same war because of his religious views about *all* wars, to deny an exemption to the former while granting it to the latter, clearly discriminates against the former religion. Such invidious discrimination will either discourage adherence to the former religious belief or will encourage dishonesty. So long as both beliefs are religious, and so long as religion remains the basis for exemption, such differing treatment is constitutionally prohibited, see *Bolling v. Sharpe*, 347 U. S. 497 (1954), for it is hardly a reasonable classification, so long as both applicants for exemption are equally sincere and base their applications on their respective religious beliefs.

C. The issue is appropriate for determination at this time because the ambiguity of the statute and regulations has produced uncertainty and conflicting decisions which have caused and will cause serious harm.

1. THE PROBLEM IS IMPORTANT AND RECURRING.

There is currently a great deal of concern over this problem, caused largely by the frightening potential of modern warfare and by uncertainties as to our present Vietnam involvement. The problem is not new, however. It was with us in World War II, Sibley & Jacob 69, and goes back as far as Catholic and earlier notions of the just war.

2. THE STATUTE AND REGULATIONS ARE AMBIGUOUS AND THE DECISIONS ARE CONFLICTING WITH MOST HAVING BEEN WRONGLY DECIDED.

As noted, Petitioner applied under AFR 35-24, par. 2b, the key sentence of which provides that:

> "Accordingly, bona fide religious objection to participation in war, in any form, has been recognized to the extent that such an objector is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest".

This section is patterned after 50 U. S. C. § 456(j), and thus decisions under that statute are relevant to the interpretation of AFR 35-24.

A long line of cases have allowed the claim of selective opposition to war. In *Sicurella v. United States*, 348 U. S. 385 (1955) this Court held that a Jehovah's Witness, who believed in the use of force to defend his "ministry, Kingdom Interests and * * * his fellow brethren," 348 U. S. at 388, though not himself, and would fight in a war at God's request, though apparently only with spiritual weapons,

was entitled to conscientious objector status. Two Justices dissented, claiming that the defendant was being allowed to choose the wars he would fight in. In accord with this decision, the lower federal courts have granted Jehovah's Witnesses such exemptions in a long series of cases, even where the Witness was willing to slay men at Jehovah's request. See, *e.g., Kretchet v. United States,* 284 F. 2d 561 (9th Cir. 1961). Although the Court in *Sicurella* stressed that such orders had not yet come from Jehovah and were unlikely to, all these defendants appeared willing to use force in defense of their Church or their brethern, but not aggressively, just as Petitioner expressed willingness to use force in defense of his country but not aggressively.

In addition, the recent decision of *Fleming v. United States, supra,* seem to have granted an exemption to one who believed that some wars are permitted. Though he thought "love and positive forces" would usually be effective to eliminate war, he added that "force should be used only as a final alternative and under fair circumstances." 344 F. 2d at 914. Expressly adverting to defense of country, as did Petitioner, the defendant in *Fleming* stated that "self-defense of a people would not involve war—but protection against a smaller group which could not be reconciled by intelligence and positive forces." *Ibid.*

On the other hand, a few cases have held that the phrase "participation in war in any form" precludes an exemption for selective objectors. *United States v. Kauten,* 133 F. 2d 703 (2d Cir. 1943); *cf. U. S. ex rel. Phillips v. Downer,* 135 F. 2d 521, 524 (2d Cir. 1943); *United States v. Kurki,* 255 F. Supp. 161 (E. D. Wis. 1966). In *Kauten,* however, the defendant was an avowed atheist who based his opposition on philosophical grounds. The invidious discrimination and interference with religious conscience which

would result from discriminatory treatment against the religiously-motivated selective pacifist were obviously not present. Moreover, the absence of a religious basis, in and of itself, of course disqualified the applicant, under *Seeger's* interpretation of § 456(j).

The *Kurki* case and the Government rely on the claim that "in any form" modifies "war", and precludes the right to choose among wars. As a matter of literal construction, there is no reason not to read the qualification "in any form" as modifying "participation," which would grant an exemption to any man who conscientiously and religiously refuses to participate "in any form," of combatant training and service in connection with a war. It thus implies nothing about whether this must be with respect to all wars, or can be only with respect to some. This indeed, was precisely the position taken by the Eighth, Seventh and Second Circuit. See *Taffs v. United States,* 208 F. 2d 329. 331 (8th Cir. 1953), *cert. denied,* 74 Sup. Ct. 532 (1954); *United States v. Hartman,* 209 F. 2d 366, 371 (2d Cir. 1954); *United States v. Close,* 215 F. 2d 439, 442 (7th Cir. 1954).

Thus, in *Taffs,* the Court declared that

> "The words, 'in any form', obviously relate, not to 'war' but to 'participation in' war. War, generally speaking, has only one form, a clash of opposing forces. But a person's participation therein may be in a variety of forms. He may be carrying a rifle, piloting a plane, working in a clerical staff behind the lines, or working in a defense plant on the home front. We think Congress intended by this section to exempt those persons from serving in the armed forces whose religious beliefs were opposed to any form of participation in a flesh and blood war between nations."

Regardless of whether this case involved Jehovah's Witnesses and theocratic wars, the Court's interpretation of the modifying clause is appropriate to all cases.

This reading is supported by AFR 35-24 itself, which insert a comma after "participation in war" so that the sentence reads "participation in war, in any form" indicating that the modified term is "participation in war" not merely "war". And the substance of this regulation supports such a reading for it describes such an objector as one who does not serve in the military but will serve in a civilian capacity.

This is further borne out by the Selective Service Regulations defining Class 1-A-O, and Class 1-O, the former of which calls for service in a combatant capacity while the latter involves only civilian service:

> "1622.11 Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only. (a) In Class I-A-O shall be placed every registrant who should have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously imposed to combatant training and service in the armed forces."

> "1622.14 Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest. (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in both combatant and non-combatant training and service in the armed forces."

It should be noted that one who will enter the military in a noncombatant capacity (Class 1-A-O) is not described as one opposed to "participation", whereas the person who will have nothing to do with the military in *any* capacity is so described. If "in any form" relates to war, the phrase "participation in war in any form" would be equally applicable to both classes of conscientious objectors. But if it relates to "participation," it is only applicable to Class

1-O where the individual will not serve in any capacity, *i.e.*, will not participate in any form.

Furthermore, while "in any form" grammatically speaking, relates to participation, it is an awkward expression if intended to modify war. "All wars" or "any war" would have been a much smoother expression of that intention.

Seeger's citation to the *MacIntosh* dissent lends some further support to this reading. The *Seeger* case first cited this dissent, as "enunciat[ing] the long recognition of conscientious objection," and quoted Chief Justice Hughes' eloquent defense of the right of conscience, a *defense made on behalf of a selective objector*. Moreover, other key quotations and citations in *Seeger*, see 380 U. S. at 170, are in the same paragraph as that in which the Chief Justice Hughes declared that "Professor MacIntosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine." 283 U. S. at 633-34. These statements by Professor MacIntosh were a profession of selective opposition. See 283 U. S. at 617-19. Surely the adoption of the rationale of the *MacIntosh* dissent by both the *Seeger* court and by Congress, see 380 U. S. at 170, impliedly adopted its application to the very situation in which that rationale was first enunciated—selective opposition based on conscience.

For all these reasons, and because a different interpretation would raise serious constitutional questions, see *Seeger, supra,* AFR 35-24 and 50 U. S. C. § 456(j) should be interpreted as allowing an exemption to selective objections. The varying interpretations and circuits are so deeply in conflict that this Court should at least resolve the issue at this time to avoid further conflict.

II. The courts below erroneously dismissed petitioner's *habeas corpus* proceeding on the ground that he had failed to exhaust his remedies within the military service.

A. The doctrine of exhaustion of remedies is inapplicable to the circumstances of this case.

In stating the legal issue before it on the defendants' motion to dismiss, the district court said (Appendix to petition 11a):

> "The threshold question is whether this court has jurisdiction to entertain the suit and grant the relief requested. On its face it is a collateral attack on an administrative decision which is made prior to the completion of the proceedings in the department. It anticipates the refusal of the Air Force to refuse to recognize plaintiff's stand and seeks to avoid court martial proceedings and the imposition of sanctions. Thus, the initial question is whether the plaintiff has exhausted the remedies which exist within the military establishment whereby this court can entertain the action."

The Court's answer to its statement of the issue was: "We conclude we are without jurisdiction to hear the plaintiff's claim. It is a collateral attack * * * We must restrain ourselves from interfering with the military processes. Plaintiff would have us short circuit all of these proceedings so as to spare him from military justice" (*id.* at 17a-18a). The Court relied wholly on the doctrine of abstention which, it stated, "has been applied consistently to military adjudications" (*id.* at 12a). The Court of Appeals affirmed on this ground.

We submit that the exhaustion doctrine relied upon by the Courts below is not applicable to a case like the present. Where court martial proceedings have already been instituted against persons under the asserted jurisdiction of the military, the federal courts have been scrupulous to

avoid interfering until every phase of those proceedings has been availed of. All of the cases cited by the district court involved situations in which this had not been done. In *Wales v. Whitney*, the Court indicated that the petitioner should not press his attack on jurisdiction until the court martial had passed upon the claim that it lacked jurisdiction. The action which led to the petitioner's seeking relief was the service upon him of an order issued by the Secretary of the Navy placing him under arrest and directing him to appear before a court martial for trial on a stated date. In other words, a court martial proceeding had purportedly been instituted from which the petitioner was seeking collateral relief on jurisdictional grounds, although opportunities were available to present those grounds in the very proceeding which gave rise to the claim.

In *Gurik v. Schilder*, 340 U. S. 128 (1950) this Court held that, before attacking in civilian courts a court martial conviction, the petitioner was required to utilize a statutory procedure allowing a petition for a new trial by the court martial. The well settled doctrine requiring exhaustion of remedies within the court martial system was held to be applicable although the procedure authorizing a new trial had not become available until after the district court had held a hearing in the *habeas corpus* proceeding and released petitioner. The Court referred to the desirability of using the "procedure established to police the errors of the tribunal whose judgment is challenged" (p. 132). It can hardly be said that a court martial was set up to police errors made by the Secretary of the Air Force under a formal procedure in which he was vested with final authority to determine the status of claimed conscientious objectors in the service. This proposition becomes all the more clearly inapplicable in the light of the fact that under the Uniform Code of Military Justice court martial deter-

minations involving the dismissal of commissioned officer must be reviewed by the Secretary 10 U. S. C. § 871. It would be anomalous to hold that, before resort to the Courts, it was necessary to provoke a criminal proceeding culminating in review by the official whose action is challenged.

The district court also cited a series of decisions of the Court of Appeals for the Tenth Circuit applying the exhaustion doctrine.* In each one of those cases the court martial proceedings had already been instituted and *habeas corpus* was sought for relief against alleged jurisdictional errors in the court martial proceeding itself while that proceeding was still incomplete.

The inapplicability of the exhaustion doctrine to the present case is further shown by the decision of this Court in *Orloff v. Willoughby*, 345 U. S. 83 (1953). There, while the petitioner sought release from the service, an alternative form of relief requested was the granting of a commission. The issue of petitioner's right to a commission was disposed of by this Court on the merits although administrative proceedings directed to that issue were still pending. 345 U. S. at 86.

B. Under well established authority, Federal Courts have jurisdiction to adjudicate in Petitioner's present *habeas corpus* proceeding the lawfulness of the refusal of the Department of the Air Force to discharge Petitioner or to assign him to non-combatant training and service.

It has long been settled that *habeas corpus* is available to test the claim of a person inducted into the armed forces

* Gorko v. Commanding Officer, 10 Cir. 1963, 314 F. 2d 858; Spencer v. Hunter, 10 Cir. 1949, 177 F. 2d 370, *cert. denied* 344 U. S. 869; Simmons v. Hunter, 10 Cir. 1960, 179 F. 2d 664, *cert. denied* 339 U. S. 968; McMahan v. Hunter, 10 Cir. 1950, 179 F. 2d 661, *cert. denied* 339 U. S. 968; Reck v. Hunter, 10 Cir. 1950, 179 F. 2d 784; Dickens v. Hunter, 10 Cir. 1950, 179 F. 2d 784; Hunter v. Beets, 10 Cir. 1950, 180 F. 2d 101, *cert. denied* 339 U. S. 963; McKinney v. Finletter, 10 Cir. 1953, 205 F. 2d 761.

that his induction was the result of action by a local draft board beyond its jurisdiction under the Selective Training and Service Act. *Estep v. U. S.*, 327 U. S. 114, 123-4, 140 (1946). Likewise, a member of the armed forces imprisoned by action of a court martial may have the lawfulness of the court martial proceeding reviewed by federal courts in *habeas corpus* proceedings. *Burns v. Wilson*, 346 U. S. 137, 139 (1953).

In both situations, the scope of review is restricted: it is usually stated to be limited to questions involving the "jurisdiction" of the selective service board or the court martial. "Jurisdiction" in these respective contexts is held to be lost if the administrative determination in the Selective case has "no basis in fact" *Witmer v. United States*, 348 U. S. 379, 381 (1955), or if the court martial proceedings "denied [the petitioner's] basic rights guaranteed by the constitution." *Burns v. Wilson*, 346 U. S. at 139, or failed to deal "fully and fairly with an allegation raised in that application." *Id.* at 142.

While the present case does not include a claim either of detention pursuant to conviction by a court martial or of unlawful induction into service, it does involve a claim that circumstances which developed subsequent to induction have made continued retention in the sevice unlawful. *Orloff v. Willoughby*, 345 U. S. 83 (1953), is a case precisely parallel to the present one and indicates the applicability of the general principle as stated above. A doctor had been conscripted under the special provisions of the Selective Service Act authorizing the induction of doctors although they had passed the ages generally liable to induction. He petitioned for *habeas corpus*, claiming that he should either be commissioned, or discharged, or assigned to medical duty. This Court held that under the statute, he was not

required to be commissioned, but he was required to be assigned to medical service. Finding that he was so assigned, the Court dismissed the petition on the merits. The Court refused relief on the ground that it was not the function of *habeas corpus* "to determine whether specific assignments to duty fell within the basic classification of petitioner" (*id.* at 93). A comparable issue would have arisen here if the defendant Secretary had recognized petitioner's right to a conscientious objector's status, had elected to assign him to noncombatant duty, instead of discharging him, as authorized by AFR 35-24, B. 8a (2), and petitioner were seeking a review of the specific character of a particular duty assignment. But that issue, which the Court in *Orloff* declined to consider, has not arisen here.

What is significant for the present case is that in *Orloff* no question was raised about the jurisdiction of the Courts to entertain the *habeas corpus* proceeding, although like the present petitioner, the doctor was in military service and could have provoked court martial proceedings to review the legality of his duty assignment by refusing to follow it. There was no suggestion that he should have done this. Rather the Court implied that the doctor would have been entitled to release if he had not been assigned to medical duties when it said:

> "We agree that the statute should be interpreted to obligate the Army to classify specially inducted professional personnel for duty within the categories which rendered them liable to induction" (p. 88).

We submit that the Directive and Regulations establish an obligation to consider Petitioner's claim to be treated as a conscientious objector which is as fully binding upon the Air Force as the statutory direction in *Orloff* was upon the Army. This is not the case of a discretionary personnel action by the Secretary of the Air Force, as would be his re-

fusal of an ordinary request for discharge. It is a case of formal action pursuant to a duly established procedure under a mandate from the Department of Defense which prescribes not only the procedure but the governing standards. Under the relevant statutes (5 U. S. C. 171a(2)), the Secretary of Defense is vested with direction, authority, and control over the Department of Defense", within which the Department of the Air Force exists as a military department which "shall function under the authority, direction, and control of the Secretary of Defense" (5 U. S. C. § 171 (c)(7)). These circumstances authoritatively establish a criterion to which, even if it were not constitutionally required, the Secretary was legally obligated to adhere.

We submit furthermore that the failure to consider Petitioner's claim would be an unconstitutional discrimination, even if not a denial of his constitutional right to express his religion. Whether or not the recognition accorded to conscientious objectors on religious grounds by 50 U. S. C. App. 456 (j) is constitutionally required, it would be unconstitutionally discriminatory, while granting it to those inducted under the Selective Service Law, to withhold it from those who enlisted in the armed forces voluntarily. The religious conviction involved is no less entitled to recognition if acquired after entry into the armed services than if acquired before. Indeed, the present case vividly illustrates how arbitrary such a distinction would be. Petitioner was in the reserve officer's training corps while in college, and enlisted immediately upon graduation. That his religious convictions should continue to develop as his intellectual and spiritual growth continued is natural. Assuming the sincerity of those developing convictions, as we must upon the present record, the refusal to recognize them would lack any rational justification.

For these reasons, we submit that *Brown v. McNamara*, 263 F. Supp. 686 (D. N. J. 1967) and *Chavez v. Fergusson*, 266 F. Supp. 879 (N. D. Cal. 1967) are in error insofar as they hold that a member of the armed forces who voluntarily enlists has no legal basis for claiming consideration as a conscientious objector.

The *Brown* case also holds that the Federal Courts lacked jurisdiction on *habeas corpus* to determine "whether there is any basis in fact for the determination" made by the service that the claim of conscientious objection is unfounded (263 F. Supp. at 693). We submit that this conclusion is likewise erroneous.

If, as we contend, petitioner is legally entitled to a determination as to whether or not he is a conscientious objector, then the jurisdictional basis for reviewing that determination under the Selective Training and Service Act, as enunciated in *Witmer v. U. S.*, 348 U. S. 375 (1955) is likewise applicable here. Hence a jurisdictional basis exists for challenging the Secretary's determination that petitioner "did not establish that he was a conscientious objector within the meaning of AFR 35-24" (B. p. 10). If it rested upon a refusal to accept the genuineness of petitioner's belief, there was "no basis in fact for the determination" on the record in this case. *Cf. Dickinson v. United States*, 346 U. S. 389 (1953). If it rested upon the ground that Petitioner's conscientious objection was to a particular war, and not to all wars, it raises a question as to the meaning of the standard embodied in the Selective Service and Training Act and the Directive and Regulations, comparable to the issue presented in *Orloff:* the interpretation of a legal standard the application of which determines the lawfulness of a person's subjection to military service. Indeed, the necessity for judicial review is greater than it was in

Orloff since the standard here has a constitutional foundation not present in *Orloff*. As this Court made clear in *Harmon v. Brucker*, 355 U. S. 579, 481-82 (1958), the Armed Forces are not beyond the reach of the general principle that "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers".

C. Petitioner has properly invoked such jurisdiction.

Petitioner made formal application under Air Force procedures (AFR 35-24), duly established pursuant to mandatory requirements of Department of Defense Directive 1300.6, August 21, 1962, for discharge as a conscientious objector. As the Government conceded below, Headquarters, United States Air Force, processed Petitioner's application in accordance with the provisions of AFR 35-24 (Brief p. 10); an advisory opinion was obtained from the Selective Service System in accordance with that regulation; and a decision was made in the Office of the Secretary that petitioner "did not establish that he was a conscientious objector within the meaning of AFR 35-24" (Brief p. 10). This determination of the Secretary has since been reaffirmed. Petition p. 18.

In bringing his action below, Petitioner claimed, among other things, that the refusal of the Secretary to recognize him as a conscientious objector was in violation of the regulation and of the provisions of the conscientious objector provisions of the Selective Training and Service Act 50 U. S. C. App. § 456(j), which were adopted by Department of Defense Directive 1300.6, III.F. and AFR 35-24 (A2b); and that the denial was unconstitutionally arbitrary and denied petitioner's fifth amendment rights to due process of law and equal protection, and his first amendment right to the free exercise of his religion (complaint ¶ 35, 36, 37).

These contentions, we submit, were sufficient to invoke the jurisdiction of the federal courts.

Conclusion

For these reasons, *Amicus* requests that the petition for certiorari be granted, and that the decision of the court below be reversed.

Respectfully submitted,

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